NO. 41999-8-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

CARMEN DIAZ

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CLARK COUNTY

Before the Honorable Robert L. Harris, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The appellant was denied his constitutional right to a fair and impartial trial under the sixth amendment to the United States Constitution and under article 1, § 22 of the Washington State Constitution when an expert witness testified that injuries to the alleged victim's arm and back were consistent with being "forcibly held down" and that the type of injury to her genitalia was most often seen following either childbirth or "sexual assault."

2. The appellant's right to confrontation under the sixth amendment to the United States Constitution and article 1, § 22 of the Washington State Constitution was violated when an expert witness' testimony was based on the work of another Sexual Assault Nurse Examiner (SANE) who did not testify, and that work was done for the purpose of criminal prosecution.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was the appellant's right to a fair and impartial trial under the Sixth Amendment to the United States Constitution and article 1, § 22 of the Washington State Constitution violated when to State's expert witness testified that the injuries sustained by the alleged victim to her arm and back were consistent with being "forcibly held down" and that the type of injury to her genitalia was most often seen following either childbirth or "sexual

assault," when the issue of consent was the primary issue to be determined by the jury? Assignment of Error 1.

2. Was the appellant's right to confrontation under the Sixth Amendment and article 1, § 22 of the Washington State Constitution violated when an expert witness' testimony was based on an examination by another SANE nurse who did not testify at trial and where that examination was done for the purpose of criminal prosecution? Assignment of Error 2.

C. STATEMENT OF THE CASE

1. Procedural facts:

The State charged Carmen Diaz with Rape in the Second Degree (Domestic Violence), and Harassment (Death Threats), contrary to RCW 9A.44.050)(1)(a) and 9A.46.020. Clerk's Papers [CP] 1. The information alleged in relevant part:

> **COUNT 01- RAPE IN THE SECOND DEGREE (DOMESTIC VIOLENCE) –10.99.020/9A.44.050/9 A.44.050(1)(a)**
>
> That he, Carmen Lucero Diaz, in the County of Clark, State of Washington, on or about December 17, 2009, did engage in sexual intercourse by forcible compulsion with L.S.S. (DOB 5/23/85); contrary to Revised Code of Washington 9A.44.050(1)(a).
>
> And further, that this crime was committed by one family or household member against another, and that this is a domestic violence offense as defined by RCW 10.99.020 and within the

meaning of RCW 9.41.040 [DV].

CP 1.

Jury trial in the matter started February 7, 2011, the Honorable Robert L. Harris presiding.

Neither exceptions nor objections to the jury instructions were taken by counsel for the defense. 6Report of Proceedings [RP] at 988.[1]

The jury returned a guilty verdict on February 11, 2011 to the charge of rape in the second degree. CP 705. The jury returned special verdict finding that the crime was committed against a family or household member. CP 707. The appellant was found not guilty of harassment as charged in Count 2. CP 706. The Court imposed a standard range sentence of 90 months on March 30, 2011. 6RP at 1049; CP 727.

Timely notice of appeal was filed on April 14, 2011. CP 747. This appeal follows.

2. Testimony at trial:

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[1]The record of proceedings consists of six volumes:
1RP—December 18, 2009, December 30, 2009, January 7, 2010, January 28, 2010, March 23, 2010, May 10, 2010, May 21, 2010, June 2, 2010, June 29, 2010, August 27, 2010, September 16, 2010, October 19, 2010, November 5, 2010, and November 15, 2010; 2RP—November 17, 2010, December 8, 2010, December 14, 2010, February 3, 2011, February 7, 2011; 3RP—February 8, 2011, jury trial; 4RP—February 9, 2011, jury trial; 5RP –February 10, 2011, jury trial; 6RP –February 11, 2011, jury trial, March 11, 2011, hearing; March 30, 2011 sentencing.

Appellant Carmen Diaz first met L.S.[2] in January, 2008, at a restaurant in Vancouver, Washington where she worked as a waitress. 4Report of Proceedings [RP] at 676. Through an interpreter, L.S. testified they started going out and he subsequently moved his things into her apartment. 4RP at 676, 677. L.S. stated that they broke up on December 6, 2009. 4RP at 678. She testified that she did not call him or look him up, and that she thought that he would eventually come back and they could talk things over. 4RP at 768-69. She was at her apartment on the evening of December 16, 2009, and got call from her sister Lidia. 4RP at 680,681. As they were talking, L.S. heard someone pounding on her door. 4RP at 681. After some discussion she determined it was Mr. Diaz and she let him into the apartment. 4RP at 691, 692. She said that after he came in he started looking around the apartment; that he looked in the bedroom, looked under the bed, looked in the children's bedroom, and in the kitchen. 4RP at 691-93. She stated that she pulled him to the couch in the living room, and that they were talking on the couch when she received a call she identified as being from her friend Coila. 5RP at 706. She stated that Mr. Diaz took her cell phone and would not let her answer the phone. 4RP at 695, 5RP at 706-7.

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[2] Although L.S.'s full name appears in the transcript, initials are used in

She used the home phone to return Coila's call and talked with her for about three minutes. 5RP at 708. She stated that Coila asked if Mr. Diaz was there at the apartment, and L.S. said that he was. 5RP at 709. She stated that Coila wanted to talk to him, so she gave the phone to Mr. Diaz and they talked for approximately ten minutes. 5RP at 709. She testified that after he hung up, he got mad and he pulled off her clothes and then raped her. 5RP at 711-22. She stated that she told him to leave her alone and to get away, and that she tried to kick him and take his hands away from her hands, but that she could not stop him. 5RP at 718,719. She said that afterward he threw things around the apartment including candles, a flowerpot, and pictures. 5RP at 734. 737. She stated that he picked up a candle and threw it at her, putting a hole in the wall. 5RP at 725. She stated that he then put $30.00 on the refrigerator and said "that's what you're worth." 5RP at 740. L.S. testified that he then took her outside the apartment and made her throw garbage bags into the trash receptacle. 5RP at 743. She said that she saw his car driving toward her, and then she fell down, but did not know if she was pushed or if she fell. 5RP at 743. She stated that a neighbor came out and that she went back into her apartment. 5RP at 744.

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this Brief to protect her privacy.

L.S. testified that after she went back to her apartment she called Mr. Diaz, and that he laughed and hung up the phone, and then later turned off his phone. 5RP at 745. She then called Coila, and she went to L.S.'s apartment, and later her sister Lidia also went to her apartment also. 5RP at 746. L.S. called the police later that morning. 5RP at 748.

Police were dispatched to the scene of a reported rape at an apartment located at 2011 Brant Road in Vancouver, Washington at approximately 2:40 a.m. 4RP at 606, 676. L.S. was seated on a couch in the living room and police observed a hole in the wall by the door to the bedroom, dirt on floor, and a vacuum cleaner near the dirt. 4RP at 607. A police officer called the "language line," and an interpreter translated L.S.'s responses to the officers' questions. 4RP at 609. L.S. was admitted to the Southwest Medical Center emergency room in Vancouver, Washington on December 17, 2009. 3RP at 535, 4RP at 610.

At approximately 4:30 a.m. on December 17, 2009, police went to Mr. Diaz' brother's house, where they had been told that they would find Mr. Diaz. 3RP at 430; 6RP at 968. They were let into the apartment and contacted Mr. Diaz, who was sitting on a couch. 3RP at 430; 4RP at 611, 618. Vancouver Police Officer Lee Yong stated that Mr. Diaz told him that

he went to L.S.'s apartment at 10 p.m. on December 16 and that they watched television and kissed. 3RP at 431. He stated that he found one of his work boots and believed it was being used a "black magic object" and that it made him angry and he threw it, putting a hole in the wall. 3RP at 431. He tried to clean it up and that she would not leave him alone so he left. 3RP at 431. After he was asked a question in Spanish by another officer, Mr. Diaz said in English that he and L.S. had had sex. 3RP at 432. He also stated that it was consensual and that she had not told him that she wanted to stop. 3RP at 433.

A sexual assault examination was performed at the Southwest Medical by Barbara Bower. Due to a medical issue, Ms. Bower was not available to testify at trial. Over defense objection, the State introduced testimony of Sexual Assault Nurse Examiner (SANE) Irene Sheppard. Ms. Sheppard did not examine L.S., but reviewed the chart and photographs created by Ms. Bower while documenting L.S.'s sexual assault exam. 4RP at 536.

Ms. Sheppard testified to the sexual assault examination process, noting that it starts when a triage nurse "deems that this is probably a sexual assault, she'll stop right there to prevent the person from having to repeat

their story too many times." 4RP at 525. Ms. Sullivan testified to the use of toluidine blue, a staining substance put on intact tissue to reveal fresh tears or abrasions. 4RP at 539-40.

Ms. Sheppard described the injuries to L.S.'s arm, neck, back, and genitalia. 4RP at 536, 544, 557, 559. She testified as to the size and quality of abrasions found in the examination, noting that L.S. had an erythema on her right lower arm and right forearm, an erythema the back of her neck and on her lower left leg. 4RP at 536-37. Ms. Sheppard also described the anatomy of the vaginal area and the bodies' responses during sexual activity. 4RP at 542, 543, She also described a tear to the labia minora and to the fossa navicularis, the immediate opening to the vagina. 4RP at 538, 540. She stated that she would normally see tears in the labia minora during delivery or trauma. 4RP at 541, 542. She stated that the cause of tears to the labia minora "occurs, in my practice, most of the time in sexual assaults and also in birth." 4RP at 544. She stated that tears to the labia minora typically occur during delivery "and through trauma." 4RP at 542. She also stated that she would typically see tears to the fossa navicularis "during trauma, during delivery or associated with vaginal delivery, insertion of something that

didn't fit into that space." 4RP at 541. Ms. Sheppard testified that L.S.'s vaginal injuries were consistent with blunt force trauma. 4RP at 553.

The State asked Ms. Sheppard if L.S.'s injuries to her right arm were consistent with being "forcibly held down", whether the injury to her neck was consistent with being bit, and if the injury to her neck consistent with being thrown down on her back and being forcibly held down on her back. 4RP at 549-50. In each case Ms. Sheppard answered in the affirmative. *Id.*

Dr. Philip Welch testified that erythema did not mean bruising as Ms. Sheppard had testified, but instead means redness or pinkishness. 4RP at 650. He stated that an erythema does not necessarily develop into a bruise. 4RP at 650, 651.

Dr. Welch testified that in his review of the records he was unable to find two tears as reported by Ms. Bowers. 4RP at 646. He stated that instead of two tears, his review of the L.S.'s chart denoted a small tear and an abrasion. 4RP at 486. He stated that nothing about consent could be assumed from the presence of the tear and abrasion, and that it could have occurred as result of regular, consensual sex. 4RP at 646, 647. Dr. Welch testified that in his opinion the results are highly suggestive that sex recently occurred, but that force was not used. 4RP at 648.

Carmen Diaz testified that he met L.S. at the Dan Taco Mexican restaurant in Vancouver, where she worked as a waitress. 6RP at 924. They started dating and he moved in with her about a month after they met. 6RP at 925. They later moved into their own apartment and he helped with expenses. 6RP at 927. He testified that on December 6, 2009 he broke up with her. 6RP at 935. He testified that he later heard that L.S. was sad and did not have any money for Christmas gifts or to pay her rent. 6RP at 936. He decided to go to her apartment the evening of December 16, after work. 6RP at 936, 937. He went to a store to get gifts for L.S.'s children, but did not have enough money to buy them anything. 6RP at 937. He then went to L.S.'s apartment at 10:00 or 10:15 p.m. and knocked on the door. 6RP at 938. He said that she was on the phone with her sister when he knocked and that she let him into the apartment and sat on the couch. 6RP at 938. She hung up the phone and then they sat on the couch together and talked about their relationship. 6RP at 939. He stated that they decided they were going to be okay and started kissing and then they took off their clothing and had sex. 6RP at 939. Afterward they put on their clothing and then talked and watched television. 6RP at 940. He denied that he raped L.S. 6RP at 941, 947.

Mr. Diaz said that while he was there Coila called and L.S. did not answer, and that she later returned Ciola's call and talked to her. 6RP at 948. L.S. told Ciola that Mr. Diaz was there and then handed the phone to him and he spoke with her. 6RP at 949. He told Ciola that he was doing well and that he had come back to the apartment because L.S.'s children missed him. 6RP at 949. He handed the phone back to L.S. 6RP at 950.

Mr. Diaz testified that L.S. told him that she did not have money for rent, and he had $30.00, which he put on the refrigerator. 6RP at 950. He went into the children's room to see how they were, and then she blocked the door to her bedroom, pushed him and he fell onto the bed. 6RP at 951. He opened the door and he saw in a corner of the room a boot belonging to him with a candle in it. 6RP at 951. He testified that "this was witchcraft that she was doing to me." 6RP at 952. He stated that he grabbed the candle from the boot and threw it against the wall and it made a hole in the wall. 6RP at 952. He accused her of having his "underwear in the planter," and she grabbed the planter and dumped it on the floor and said there was nothing there. 6RP at 952. He said that L.S. made the hole in the wall bigger than it was from the candle's impact, and that the hole he caused was smaller than that shown in Exhibit 53. 6RP at 954. He stated that he told her that he did not believe in

this type of thing, that he was Catholic and that it was against his religion. 6RP at 955. He asked he why she had "done that" to him, and that she said that she thought she was going to lose him and that she did it because she did not want to lose him and asked him to forgive her. 6RP at 955. He told her that he had already forgiven her and cleaned up the dirt from the planter that he said she threw at him. 6RP at 955. He then got a bag from the kitchen and put the dirt and rest of the planter in it, his boot, the candles, then used a vacuum cleaner to vacuum the carpet. 6RP at 955, 956, 957. He then threw the bag in the dumpster located to the south of the apartments. She followed him outside and did not want him to leave. 6RP at 956, 957, 964. He went back into the apartment so that she would calm down, and then went back to his car in order to leave. 6RP at 964. He stated that as he was walked back to his car, "she threw herself down onto her knees, asking me to forgive her." 6RP at 964. He said that he told her to get up, but she did not want so, so he "grabbed" her by her arms and "got her up." 6RP at 964. They went back into the apartment. 6RP at 965. He stated that she would not let him leave and was blocking him. He told her that if he got back with her, it was because he felt sorry for her. 6RP at 965. He stated that she got very upset and followed him to his car and blocked him from opening the car door. 6RP at 965, 966.

He was able to open the car door and then left, leaving her standing in the parking lot. 6RP at 966. He drove to his brother's house and went to sleep on the couch. 6RP at 966.

Mr. Diaz stated that L.S.'s sister later called and accused him of hitting L.S. 6RP at 967. He said that he did not talk with her, and that would talk with L.S. after they both had calmed down. 6RP at 967.

Juan Camaceno, a church pastor, stated that L.S. told him that she practiced witchcraft. 6RP at 907. Defense investigator Victor Montano testified that L.S. initially denied practicing witchcraft to him, but later stated that if she did, she would not do it to harm Mr. Diaz. 6RP at 917.

D. ARGUMENT

1. MR. DIAZ WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL WHEN THE STATE'S WITNESS EXPRESSED HER OPINION THAT L.S.'S INJURIES WERE CONSISTANT WITH BEING "FORCIBLY HELD DOWN" AND "SEXUAL ASSAULT"

A trial court's decision to admit evidence is reviewed under an abuse of discretion standard. *State v. Demery*, 144 Wn.2d 753, 30 P.3d1278 (2001). A trial court abuses its discretion if no reasonable person would adopt the view of the trial court. *Id.* Generally witnesses are to state facts and not express inferences or opinions. *State v. Haga*, 8 Wn.App. 481, 491, 507 P.2d

159 (1973) (citing *State v. Dukick*, 131 Wn. 50, 228 P. 1019 (1924); *State v. Wigley*, 5 Wn.App. 465, 488 P.2d 766 (1971), review denied, 82 Wn.2d 1006 (1973). However an exception to that rule as it applies to expert testimony has been created in ER 704.[3] An expert opinion is not objectionable merely because it "embraces an ultimate issue to be decided by the trier of fact." ER 704. However, a witness may not offer an opinion as to the defendant's guilt, either by direct statement or by inference. *State v. Hudson*, 150 Wn.App. 646, 655, 208 P.3d 1236 (2009); *State v. Montgomery,* 163 Wn.2d 577, 591, 183 P.3d 267 (2008) (citing *State v. Demery,* 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (plurality opinion)); *State v. Black*, 109 Wn.2d 336, 248, 745 P.2d (1987) ("No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference.") This type of expert opinion violates the defendant's "inviolate" constitutional right to a jury trial, which vests in the jury "'the ultimate power to weigh the evidence and determine the facts.'" *Montgomery,* 163 Wn.2d at 590, 183 P.3d 267 (quoting Wash. Const. art. 1, § 21, and *James v. Robeck,* 79 Wn.2d 864, 869, 490 P.2d 878 (1971).

Testimony of this nature is excluded pursuant to the Sixth

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[3]ER 704 states as follows:

Testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Amendment to the United States Constitution and Article 1, § 22 of the Washington State Constitution which guarantee the right to a fair trial before an impartial trier of fact. The presentation of a witness' opinion as to the defendant's guilt, even by mere inference, violates this right by invading the province of the jury. *State v. Hudson*, 150 Wn.App. at 652; *State v. Thompson*, 90 Wn.App. 41, 46 950 P.2d 977, review denied, 136 Wn.2d 1002 (1998).

a. SANE expert Sheppard's testimony expressed an improper conclusion of law.

Here, SANE expert Irene Sheppard's testimony constituted an inadmissible conclusion of law. Although a witness may testify as to matters of legitimate issues, a witness may not give legal conclusions. See *Hyatt v. Sellen Constr. Co., Inc.*, 40 Wn.App. 893, 899, 700 P.2d 1164 (1985); *Everett v. Diamond*, 30 Wn.App. 787, 791-792, 638 P.2d 605 (1981). Improper legal conclusions include testimony that the defendant's conduct violated a particular law. *Hyatt v. Sellen Constr. Co., Inc.*, 40 Wn.App. at 789. Experts may not offer opinions of law in the guise of expert testimony. *Stenger v. State*, 104 Wn.App. 393, 407, 16 P.3d 655, review denied, 144 Wn.2d 1006, 29 P.3d 719 (2001). As noted *supra*, improper expert testimony

in this fashion violates a defendant's right to a fair and impartial trial under the Sixth Amendment to the United States Constitution and Article 1, Section 22 of the Washington State Constitution.

Ms. Sheppard testified that L.S.'s injuries to her arm and back were consistent with being "forcibly held down," that she had an injury on her neck consistent with being bitten, and that an injury to her neck consistent with thrown on her back. 4RP at 549-50. Ms. Sheppard also provided her opinion that a tear observed in the examination L.S.'s labia minora occurred "most of the time" in sexual assaults, and also child birth. 4RP at 544. Ms. Sheppard also expressed the opinion that L.S.'s injuries to her genitalia were consistent with blunt force trauma. 4RP at 553. This latter testimony was not objectionable and sufficient to allow the State to argue its theory of the case: that the act of intercourse sex act between L.S. and Mr. Diaz was not consensual and committed by forcible compulsion. However, Ms. Sheppard also testified that sexual assault could cause the injuries to L.S.'s genitalia, and the abrasions observed by Ms. Bower were consistent with being bitten, thrown on her back, and being forcibly held down. 4RP at 549.

This case is similar to *State v. Black, supra*, in which the Supreme Court reversed a rape conviction for improper opinion testimony on the defendant's guilt. *Black,* 109 Wn.2d at 349–50. In *Black,* the defendant

admitted to engaging in sexual intercourse with the alleged victim, but he contended that she had consented to it. *Black,* 109 Wn.2d at 338. An expert psychologist testified that the alleged victim suffered from "rape trauma syndrome," which the Supreme Court held "carrie[d] with it an implied opinion that the alleged victim is telling the truth and was, in fact, raped." *Black,* 109 Wn.2d at 349, 745 P.2d 12.

Here, there was no testimony regarding childbirth (which, according to the SANE expert, could result in the injuries observed) or a second sexual encounter in the relevant time period, the expert's opinion that the injuries she described occurred "most of the time" in either childbirth or sexual assault. 4RP at 544. As was the case in *Black,* Ms. Sheppard's testimony "constitutes, in essence, a statement that the defendant is guilty of the crime of rape." *Black,* 109 Wn.2d at 349.

For the SANE nurse to go beyond the opinion that the injuries were from a trauma to allowing testimony that the injuries were the product of sexual assault and force was error, and because there was no testimony of sexual encounters in the relevant time period other than with Mr. Diaz, her opinion amounted to statements that he was guilty of rape. Under *Hudson* and *Black,* the opinion was improper. The portions of her testimony discussed

in this brief were not statements of fact but were conclusory statements of legal opinion. The critical legal issue at Mr. Diaz' trial was whether the sexual encounter on December 16 with L.S. was consensual. The witness expressed an opinion on the ultimate legal question before the jury, because if the sex act was a "sexual assault," Mr. Diaz was *a priori* guilty of the offense as charged.

b. Ms. Sheppard's testimony expressed an improper opinion as to Mr. Diaz' guilt.

As noted above, expert witnesses may not offer an opinion as to the guilt of a defendant either directly or by inference. *State v. Montgomery,* 163 Wn.2d at 591.

The determination of whether testimony constitutes an impermissible opinion on the defendant's guilt is to be determined from the facts of each case. *State v. Cruz*, 77 Wn.App. 811, 814-815, 894 P.2d 573 (1995). Whether testimony constitutes an impermissible opinion about the defendant's guilt depends on the circumstances of the case, including (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact. *Montgomery,* 163 Wn.2d at 591 (quoting *Demery,* 144 Wn.2d at 759, 30 P.3d 1278).

The five factors to be considered in determining this issue under *Montgomery* suggest the evidence should be suppressed.

First, the SANE nurse proffering the testimony was proffered as an expert medical witness. The jury was likely to give high credence to her opinion. Second, the witness testified that L.S.'s injury to her labia minora occurs most often in childbirth or "in sexual assaults," and the injury to her arm and back could have been the result of being "forcibly held down." 4RP at 544, 549-50. The opinion offered by the witness constituted a direct comment on Mr. Diaz' guilt; the expert was allowed to testify that the injuries were the product of "force" and "sexual assault." 4RP at 544. Mr. Diaz was charged with having sex with L.S. by forcible compulsion. CP 1. Therefore, the testimony was a comment that the sexual encounter was by force and nonconsensual and therefore Mr. Diaz was guilty of the crime as charged in Count 1. Third, the nature of the charge in this case was significant and the proffered opinion testimony was a direct comment on Mr. Diaz' guilt. Fourth, the type of defense in this case was a "he said, she said" scenario. Mr. Diaz testified that the sexual encounter was consensual. L.S. testified that the encounter was nonconsensual. The proffered evidence supported L.S.'s view of the events as nonconsensual sex. Fifth, the other evidence presented did not suggest that Mr. Diaz had nonconsensual sex with L.S. The evidence of

guilt was not overwhelming. Both Mr. Diaz and L.S. admitted to sexual activity on December 16, 2009. The primary issue for the jury to determine was whether the activity was consensual. Mr. Diaz testified that the activity was consensual. L.S. testified that the activity was not. No neighbors in the apartment testified regarding hearing any sound of attack or rape. L.S. let Mr. Diaz into her apartment. She did not call the police immediately after the incident; she did, however, call Mr. Diaz. Mr. Diaz did not take a call from L.S.'s sister early that morning, stating that he would talk to L.S. after both of them calmed down. These factors all support Mr. Diaz' contention that the sex was consensual.

Permitting a witness to testify directly or indirectly regarding an improper opinion on guilt invades the jury's province and thus violates the defendant's constitutional right to a trial by jury. This Court applies the constitutional harmless error standard set forth in *State v. Guloy,* 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), to determine if the error was harmless. An error of constitutional magnitude is presumed prejudicial, and the State must prove beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error. *State v. Watt,* 160 Wn.2d 626, 635, 160 P.3d 640 (2007); *State v. Thach,* 126 Wn.App. 297, 313, 106 P.3d 782 2005 (quoting *Guloy,* 104 Wn.2d at 425). A constitutional error is harmless only

if the untainted evidence presented at trial is so overwhelming that it leads necessarily to a finding of guilt. *Watt,* 160 Wn.2d at 636, 160 P.3d 640.

Here, the case turned on whether the jury believed L.S. or Mr. Diaz; therefore the Court cannot find the error harmless. See *State v. Hudson,* 150 Wn.App. at 656. See also *State v. Barr,* 123 Wn.App. 373, 384, 98 P.3d 518 (2004) (constitutional error not harmless because "[a]t its heart, the ultimate issue here revolved around an assessment of the credibility of [defendant] and [victim]").

2. MS. SHEPPARD'S TESTIMONY REGARDING THE EXAMINATION PREPARED BY ANOTHER NURSE VIOLATED MR. DIAZ'S CONSTITUTIONAL RIGHT TO CONFRONTATION.

The SANE nurse's testimony regarding the charts created by another SANE nurse should have been excluded under the confrontation clauses of the state and federal constitutions. Because the erroneous admission of the evidence was not harmless beyond a reasonable doubt, reversal is required. The argument regarding harmless error in Section 1, *supra*, is adopted in Section 2 of this Brief.

An accused person has both state and federal constitutional rights to confront witnesses. Article I, § 22 guarantees an "accused shall have the

right . . . to meet the witnesses against him face to face." Wash. Const. art. I, § 22 (Amend. 10); *State v. Shafer*, 156 Wn.2d 381, 395, 128 P.3d 87, cert. denied, 75 U.S. 3247 (2006). Likewise, the Sixth Amendment protects the right of the accused to confront the witnesses against him, including those whose testimonial statements are offered through other witnesses.[4] *Davis v. Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006); *Crawford v. Washington*, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The essence of the right to confrontation is the right to meaningfully cross-examination one's accusers. *Id.* at 50, 59. Consequently, unless the speaker is unavailable and the accused had an earlier opportunity to cross-examine, hearsay evidence of a testimonial statement is inadmissible. *Id.* at 68.

In *State v. Shafer*, 156 Wn.2d 381, 128 P.3d 87 (2006), our Supreme Court concluded that article I, section 22 can offer higher protection than the Sixth Amendment with regard to a defendant's right of confrontation. *Id.* at 391-92, 128 P.3d 87 (citing *State v. Foster*, 135 Wn.2d 441, 957 P.2d 712 (1998)).

An alleged violation of the confrontation clause is subject to de novo

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[4] The Sixth Amendment to the United States Constitution provides in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses

review. *Lilly v. Virginia*, 527 U.S. 116, 137, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999); *State v. Kirkpatrick*, 160 Wn.2d 873, 881, 161 P.3d 990 (2007); *State v. Kronich*, 160 Wn.2d 893, 901, 161 P.3d 982 (2007).

Until the Supreme Court decided *Crawford*, hearsay statements made by unavailable declarants were admissible if an adequate indicia of reliability existed, i.e., they fell within a firmly rooted hearsay exception or bore a 'particularized guarantee of trustworthiness.' *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), overruled by *Crawford*, 124 S. Ct. 1371 (2004).

Under *Crawford*, "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." *Crawford*, 124 S. Ct. at 1374. But if testimonial hearsay evidence is at issue, the confrontation clause requires witness unavailability and a prior opportunity for cross-examination. *Crawford*, 124 S. Ct. at 1374.

"Testimonial" statements include those "made under circumstances that would lead an objective witness reasonably to believe that the statements

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against him. . . ."

would be available for use at a later trial." *State v. Hopkins,* 134 Wash.App. 780, 790-91, 142 P.3d 1104 (2006) (citing *Crawford*, 541 U.S. at 51-52).

The U.S. Supreme Court applied the *Crawford* analysis to statements prepared by expert, forensic witnesses in *Melendez-Diaz v. Massachusetts*, 557 U.S.___, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009). It found that the certificate of a laboratory analyst asserting that the tested substance was cocaine was a testimonial statement. *Id.*, 129 S. Ct. 2527, 2540. It rejected various arguments that the statements of scientific experts should be treated differently from the statements of other witnesses. *Id.* at 2532-42. Consequently, the analysts were "witnesses" for confrontation clause purposes and Melendez-Diaz had the right to confront them. *Id.* at 2532. Because he was not given this opportunity, the evidence should not have been admitted. *Id.* at 2542. The Court concluded, "The Sixth Amendment does not permit the prosecution to prove its case via ex parte out-of-court affidavits, and the admission of such evidence against Melendez-Diaz was error." *Id.*

In the case at bar, defense counsel objected to Ms. Sheppard's testimony regarding the records created by SANE nurse Barbara Bowers, who examined L.S. on December 17, 2009. 3RP at 476-77. Relying on *State v.*

Lui, 153 Wn. App. 304, 221 P. 3d 948 (2009), the trial court ruled that Ms. Sheppard could testify and form opinions regarding notes of injuries observed by Ms. Bowers. 3RP at 447-30.

Mr. Diaz submits that the reasoning of *Melendez-Diaz* applies when, as occurred in this case, a live expert witness testifies at trial but it is not the same person who performed the forensic analysis. Mr. Diaz argues that *Lui* can be distinguished from *Melendez-Diaz* and that *Hopkins*, a Division 3 case, is on all fours with the facts of the case at bar, and that the trial court erred by following *Lui* rather than *Hopkins*.

In *Lui*, Division 1 held that the decision in *Melendez-Diaz*, "does not preclude a qualified expert from offering an opinion in reliance upon another expert's work product." *Lui*, 153 Wn. App. at 318-19. The *Lui* Court relied for persuasive precedent on a decision of an intermediate appellate court in California and two decisions from Illinois courts. *Id.* at 323-24. It recognized, however, that "some courts have reached contrary results." *Id.* at 325, n.21.

In *Hopkins*, the State charged Hopkins with four counts of second degree child molestation and one count of second degree rape of a child. 134 Wn.App. at 783. A nurse practitioner examined the victim and produced a

report that detailed Hopkins' sexual abuse. *Id.,* 134 Wn.App. at 784. The nurse did not testify; her supervising doctor testified in her place and conveyed the contents of her report. *Id.* The supervising doctor testified that the physical exam was normal but consistent with the reported sexual activity. *Id.* The *Hopkins* Court held the doctor's testimony violated *Crawford* because the report was testimonial and that Hopkins did not have the opportunity to cross-examine the nurse. *Hopkins*, 134 Wn.App. at 790-91.

Here, Mr. Diaz submits that the court erred when it incorrectly based its ruling permitting Ms. Sheppard to testify on *Lui,* and that *Hopkins* more closely fits the facts of the case at bar. In *Lui*, the trial court admitted a medical examiner's expert opinion of a homicide victim's cause of death. *Lui,* 153 Wn. App. at 309. The expert had not performed the autopsy, but he supervised the examiner who conducted the autopsy and he reviewed the report and the evidence supporting it. He discussed with the other examiner the report's wording to describe the victim's injuries. He signed the report, indicating he agreed with its findings and found it accurate. *Lui,* 153 Wn. App. at 306-07. Emphasizing that the examiner offered his own expertise and independent review of the autopsy materials, the Court rejected Lui's

Crawford challenge because the expert was not acting as a "mere conduit" for the testimonial assertions of another. *Lui*, 153 Wn. App. at 320-21.[5]

The redacted charts from Ms. Bower's examination of L.S. and her testimony regarding the examination should have been excluded under *Crawford.* The notes were testimonial because an objective nurse would know those statements would be available for use at a later trial. The use of medical testimony in trials is commonplace, particularly in criminal trials, and most particularly in criminal trials involving domestic violence. See e.g., *State v. Williams*, 137 Wn. App. 736, 746, 154 P.3d 322 (2007).

The trial court erred in relying on *Lui* when it found Ms. Sheppard's testimony was admissible under *Lui* because Ms. Sheppard did not supervise or participate in the examination, and she had no involvement in drafting the charts. Ms. Sheppard simply reviewed the chart, making her testimony—just as was the case in *Hopkins*—the functional equivalent of the testimony of Ms. Bower, whom defense could not cross-examine.

Therefore, admission of Ms. Sheppard's testimony based on the examination conducted by another SANE nurse violated Mr. Diaz' right to confrontation.

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[5]Review was granted in *State v. Lui*, No. 84045-8 on March 30, 2010 and argued on September 14, 2010.

F. CONCLUSION

Based on the foregoing, Mr. Diaz respectfully requests this Court to reverse the conviction entered in this matter and remand the case for a new trial.

DATED: November 28, 2011.

Respectfully submitted,
THE TILLER LAW FIRM

PETER B. TILLER-WSBA 20835
Of Attorneys for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that on November 28, 2011, that this Appellant's Opening Brief was mailed by U.S. mail, postage prepaid, to the Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and copies were mailed by U.S. mail, postage prepaid, to Ms. Jennifer Nugent, Deputy Prosecuting Attorney, 210 E. 13th St., Vancouver, WA 98660-3231, Mr. Carmen Lucero Diaz, DOC # 347545, W.C.C., PO Box 900, Shelton, WA 98584, true and correct copies of this Opening Brief of Appellant.

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on November 28, 2011.

PETER B. TILLER

EXHIBIT A

STATUTES

RCW 9A.44.050

Rape in the second degree.

(1) A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person:

(a) By forcible compulsion;

(b) When the victim is incapable of consent by reason of being physically helpless or mentally incapacitated;

(c) When the victim is a person with a developmental disability and the perpetrator is a person who is not married to the victim and who:

(i) Has supervisory authority over the victim; or

(ii) Was providing transportation, within the course of his or her employment, to the victim at the time of the offense;

(d) When the perpetrator is a health care provider, the victim is a client or patient, and the sexual intercourse occurs during a treatment session, consultation, interview, or examination. It is an affirmative defense that the defendant must prove by a preponderance of the evidence that the client or patient consented to the sexual intercourse with the knowledge that the sexual intercourse was not for the purpose of treatment;

(e) When the victim is a resident of a facility for persons with a mental disorder or chemical dependency and the perpetrator is a person who is not married to the victim and has supervisory authority over the victim; or

(f) When the victim is a frail elder or vulnerable adult and the perpetrator is a person who is not married to the victim and who:

(i) Has a significant relationship with the victim; or

(ii) Was providing transportation, within the course of his or her employment, to the victim at the time of the offense.

(2) Rape in the second degree is a class A felony.